

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Biomedical Device)	
Consultants & Laboratories)	File No. 17-CV-3403
of Colorado, LLC,)	(DWF/SER)
)	
Plaintiff,)	St. Paul, Minnesota
)	December 1, 2017
vs.)	10:55 a.m.
)	
TA Instruments-Waters, LLC,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE DONOVAN W. FRANK
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)

Proceedings recorded by mechanical stenography;
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APPEARANCES

For the Plaintiff:

Dorsey & Whitney, LLP
FORREST TAHDOOAHNIPPAH, ESQ.
Suite 1500
50 South Sixth Street
Minneapolis, Minnesota 55402

Dorsey & Whitney, LLP
GREGORY S. TAMKIN, ESQ.
Suite 400
1400 Wewatta Street
Denver, Colorado 80202

For the Defendant:

Fredrikson & Byron
KATHERINE J. RAHLIN, ESQ.
Suite 4000
200 South Sixth Street
Minneapolis, Minnesota 55402

McCarter & English
KIA L. FREEMAN, ESQ.
265 Franklin Street
Boston, Massachusetts 02110

Court Reporter:

LORI A. SIMPSON, RMR-CRR
Suite 146
316 North Robert Street
St. Paul, Minnesota 55101

P R O C E E D I N G S

IN OPEN COURT

THE COURT: Before we begin and before I make a couple of comments about the procedural status of the case, why don't we have introductions of counsel first. We can start on my right, counsel's left, and then move over.

MR. TAHDOOAHNIPPAH: Thank you, Your Honor. I'm Forrest Tahdooahnippah from Dorsey & Whitney here on behalf of Biomedical Device Consultants & Laboratories of Colorado, and with me from our Denver office is Greg Tamkin. Mr. Tamkin will be arguing the motion today.

THE COURT: Good morning.

MR. TAMKIN: Good morning, Your Honor.

MS. RAHLIN: Good morning, Your Honor. I am Katherine Rahlin of Fredrikson & Byron representing TA Instruments-Waters, and with me is Kia Freeman of McCarter & English in Boston and Ms. Freeman will be arguing the motion.

THE COURT: All right. I'll make a couple of comments.

First of all, I will represent to you that myself and one of my lawyer law clerks, Ms. Converse, we have had a chance to read your submissions.

And then secondly, we can discuss at the end of the arguments today the status and any scheduling issues

1 with the preliminary injunction and the respective views of
2 each party so that I'm fully aware of where we're at.

3 And then because of that, and actually it's not
4 unique to this case or unique because it's a patent case,
5 we'll discuss at the end of the hearing whether or not --
6 and without suggesting I'll order it if there's objection
7 because I didn't come in thinking I'd be ordering it at the
8 end of the hearing. I'll wait to hear back from counsel
9 unless people say, well, the time for talk is over, here's
10 where we're at, but we could make available a magistrate
11 judge and then I'll say what I meant by that.

12 If there was some interest either before I rule on
13 this motion or before there's any formal hearing on the
14 preliminary injunction and how those should be coordinated,
15 if there's some interest in sitting down with the magistrate
16 judge to discuss settlement or mediation of some or all of
17 the issues, we can make that happen probably as soon as
18 people want it.

19 And then I will say something that is unique to
20 this case, not because of the case, but because of a
21 circumstance with our magistrate judges without getting into
22 too much private information. Because obviously the
23 assigned magistrate is Magistrate Judge Steve Rau and
24 because of some recent surgery that he's had, he's
25 temporarily, you know, not hearing some things, although,

1 for example, he was into work a couple days this week.

2 So we're in a situation where I could either --
3 and I have already discussed this with him and Magistrate
4 Judge Becky Thorson and maybe it's relevant or maybe it's
5 not, that she did nothing but patent work the last few years
6 she was practicing law. I could make one or both available,
7 depending upon circumstances, for any discussions because --
8 and we're doing that not just because it's a patent case,
9 but because of the recent surgery of Judge Rau a number of
10 people are helping out on cases. So I actually broached
11 this subject this week on this case to both. So we can have
12 that short discussion at the end of the hearing.

13 Then we can -- two things, one semi-serious, one
14 probably not serious at all. One does go to the -- could
15 potentially go to the merits. We can discuss the fact is it
16 relevant that probably the smallest number of Rule 12
17 motions do come in patent cases, even pre and post
18 Iqbal-Twombly, and so we can discuss that.

19 Now, on maybe not such a serious note, but the
20 word seems to travel that I've been on senior status since
21 Halloween of last year. One, I haven't reduced my caseload
22 and I have a number of judges wondering if I'm feeling okay
23 because I'm the first judge since Ed Devitt not to go off
24 the patent wheel. I haven't not only not reduced my
25 caseload, but I have not gone off the patent wheel, which --

1 because of the larger patent caseload we have.

2 And to the extent it's relevant, I'm actually the
3 judge who brought back to Minnesota -- primarily the patent
4 practice bar here in Minnesota gets the credit, but I
5 brought back the Northern District of California patent
6 practice local rules because they just had started the
7 Institute of Technology at Berkeley classes, ten-day
8 classes, for new or federal judges on patent trademark and
9 copyright and I was the first one from this district to go
10 in 1999 out to Berkeley and then I got exposed to the rules.
11 Then obviously to the credit, really, of the lawyers here in
12 this district, they worked those over for a time and
13 eventually implemented the rules that exist today.

14 So more than enough said by me and we -- you know,
15 maybe a trend that's not unique to patent cases and I don't
16 know if any of you -- I'm certain some of your firms and you
17 individually have experienced this, but when I've taught or
18 spoke at a couple of national patent practice or trial
19 practice institutes around the country in the last couple of
20 years, the biggest complaint by lawyers have been that oral
21 argument had disappeared and it's just not unique to
22 patents. Even though it's some very fine lawyers who --
23 fine jurists who have stopped oral argument not just on
24 patent cases, but that was one of the biggest complaints
25 that I heard. And I had a couple lawyers who were

1 participating from here saying please tell the people in the
2 room that we haven't done that in Minnesota. But, yeah,
3 that seems to be a trend in addition to sometimes, for lack
4 of a legal word, farming out Markman hearings and other such
5 things too.

6 With that, we can proceed with argument and then
7 at the end of that we'll have a short discussion on where
8 we're at and where each party thinks we should be going. So
9 whenever you are ready, Counsel.

10 For those of you visiting here, you should enjoy.
11 We rarely get that 50 degree weather.

12 And that podium goes up and down. There's a
13 little button on the front. You can make it any height that
14 you want.

15 MS. FREEMAN: Thank you, Your Honor. It seems
16 like a good level for me. Good morning, Your Honor.

17 THE COURT: And you have to kind of move the mike
18 semi close to you because they're not the -- there's two
19 there and sometimes they get in your way. You can move one
20 off to the side if you want. But they're not the fancy
21 entertainment mikes, so if you back too far off -- and
22 they're the same as yours -- it's kind of hard for everybody
23 to hear.

24 MS. FREEMAN: Okay. I'll do my best to be loud
25 enough so that you can hear me.

1 THE COURT: We're good.

2 MS. FREEMAN: Thank you for noting the problem
3 with the volume level.

4 My name is Kia Freeman and I represent
5 TA Instruments-Waters, which is the defendant in this case.
6 TA Instruments-Waters is a company known for innovative
7 cardiovascular test instruments.

8 According to the plaintiff in this case, which I
9 will refer to as BDC --

10 THE COURT: Fair enough.

11 MS. FREEMAN: -- TA Instruments, its parent and
12 its affiliates are assignees of at least 50 patents and
13 patent applications, many directed to medical device
14 testing. That's in the complaint in paragraph 5.

15 THE COURT: And sorry to interrupt to something
16 that admittedly is entirely irrelevant to the case today,
17 but it brought -- reading over the papers, even though it
18 has nothing whatsoever to do with this case, but I
19 thought of it again now when you used the phrase "medical
20 device." I had all the Guidant and Boston Scientific
21 pacemaker/defibrillator cases as a national MDL case back in
22 the -- well, it started around 2004. So the last time I
23 heard the word "medical device" used a lot -- and that, of
24 course, was not a patent case whatsoever, but it was --
25 that's kind of the last time that -- and obviously that has

1 little to do with this, but that's the last time I saw the
2 word "medical device" used so predominantly in briefing.

3 Anyway, sorry to interrupt you.

4 MS. FREEMAN: Thank you, Your Honor. It sounds
5 like you have a good background and we are lucky to have you
6 on this case.

7 THE COURT: Well, we'll see what you think when
8 we're all done.

9 (Laughter)

10 MS. FREEMAN: If you turn to Exhibit E, pages 4 to
11 5 of Exhibit E -- when I'm referring to pages of Exhibit E,
12 I'm referring to the original pages at the bottom on the
13 left-hand side.

14 THE COURT: Okay.

15 MS. FREEMAN: Exhibit E on pages 4 to 5
16 illustrates TA Instruments' innovative products. Innovation
17 in cardiovascular test instruments dates back to 1997 for
18 TA Instruments and its predecessors.

19 A predecessor of TA Instruments patented an
20 accelerated stent test instrument in 1997. That patent is
21 Exhibit 2 to the reply in this motion. And the stent test
22 instruments have been for sale by TA Instruments or its
23 predecessors since 1997, and Exhibit 6 to the reply is a
24 stent tester user manual demonstrating that.

25 Most of TA Instruments' innovative products are

1 not heart valve test instruments. Again I refer to
2 Exhibit E to the complaint on pages 4 to 5.

3 So briefly going through the products as they're
4 shown on pages 4 to 5 of Exhibit E, you have the first
5 product on the left of page 4 of Exhibit E is a planar
6 biaxial TestBench instrument. This product is used for
7 biomaterial characterization.

8 The second product on page 4 is the DuraPulse
9 heart valve test instrument, which that's a really long
10 name, so I might call it for short here the DuraPulse HVT
11 instrument.

12 THE COURT: And that's kind of how it's referred
13 to in different ways in the briefing too, so.

14 MS. FREEMAN: Yes. The third instrument on page 4
15 of Exhibit E is the DuraPulse stent/graft test instrument
16 and this also may be referred to for short as the DuraPulse
17 SGT instrument. The DuraPulse SGT instrument is a stent
18 test instrument. It does not test heart valves.

19 The fourth product on page 4 of Exhibit E is a
20 multi-specimen fixture. This tests substructures, such as
21 combinations of materials.

22 Turning to page 5 of Exhibit E, this is full of
23 different stent test instruments. None of these are heart
24 valve test instruments. The first product on the left
25 stretches stents axially and flows fluid through them. The

1 middle product on page 5 stretches stents radially and
2 cycles them pulsatively. The fourth product on page 5 of
3 Exhibit E pulses stents at high frequencies while bending
4 and stretching them in other directions. So that is the
5 ElectroForce line of cardiovascular test instruments and,
6 again, importantly, most of them are not heart valve test
7 instruments.

8 THE COURT: And I don't mean to interrupt and you
9 are probably going to address this, but obviously one of the
10 themes, separate from some of the descriptive phrases of
11 legal conclusions masquerading, I think the phrase is, as
12 factual allegations, separate from that kind of separate
13 argument that's been made, I think there's a theme and,
14 again, if you are going to get to it, I'll just sit tight,
15 but I was thinking of it as you went through these products
16 where you're saying, well, look it, the truth is there's
17 been no identification of which accused products, separate
18 from the issues of direct infringement on the claims,
19 whether it's claim 10 or the others.

20 So as you listed down all these products, you're
21 probably -- because I think one of your arguments is they
22 haven't adequately pled, well, which specific -- what are
23 the accused products. I guess that's probably where you're
24 headed.

25 MS. FREEMAN: That's absolutely right, Your Honor.

1 They do not define the accused products. Let me just turn
2 to --

3 THE COURT: And you don't have to change your
4 argument. I didn't mean to interrupt.

5 MS. FREEMAN: No, I'm happy to address that.
6 There is a section of the complaint that follows the heading
7 Defendant's Infringing Products that begins on paragraph 12
8 and goes through paragraph 16. And paragraph 12 starts out
9 by saying, "Defendant makes, sells, and offers to sell the
10 ElectroForce line of cardiovascular test instruments."

11 If you then skip ahead to the first cause of
12 action in the complaint, which begins on paragraph 17 but is
13 really put out on paragraph 20, the infringement allegation
14 is addressed to, quote, infringing products.

15 If you go to the second cause of action, which is
16 the first indirect infringement cause of action, on
17 paragraph 26 it alleges that infringement by, quote, its
18 products, end quote.

19 So the infringement contentions do provide, they
20 refer to an example, but no place in the complaint is there
21 a limitation of the accused products unless you possibly
22 could infer one to the ElectroForce line of cardiovascular
23 test products based on the section heading Defendant's
24 Infringing Products and their introduction thereafter.

25 BDC admits its asserted patents are directed to

1 methods and devices for heart valve testing. I refer Your
2 Honor to paragraph 11 of the complaint. So let's infer for
3 now an implicit -- just for purposes of argument an implicit
4 limitation of the accused products --

5 THE COURT: All right.

6 MS. FREEMAN: -- to the ElectroForce line of
7 cardiovascular test instruments.

8 The ElectroForce mark was registered in 2002 based
9 on a first use at least in 2000. I refer Your Honor to
10 Exhibit 5 to the reply. In contrast, each of the four
11 asserted patents claim priority to 2009. You can look at,
12 of course, the patents for that. So the ElectroForce line
13 of cardiovascular test products were available nine years
14 before the priority claim of the asserted patents. So
15 TA Instruments asks the Court not to hear BDC's suggestion
16 that TA Instruments' innovative products that predate the
17 asserted patents infringe the asserted patents.

18 Your Honor, there's no dispute that the
19 Twombly-Iqbal standard applies here. Under Twombly-Iqbal,
20 pleadings are not necessarily entitled to the assumption of
21 truth. That's in Iqbal at page 680 and there the Supreme
22 Court begins its analysis by identifying allegations that
23 are entitled to the assumption of truth. There would be no
24 reason to do that if all allegations were entitled to the
25 assumption of truth.

1 THE COURT: Well, and not to suggest it's the same
2 issue, but something not unique to patent cases but
3 consistent with kind of what you're saying is how that's
4 often asserted and it's in the air here in this case, you
5 know, one of the things that are entitled to whether we call
6 it a plausible or reasonable inference or assume it to be
7 true and then here comes the phrase we see a lot, sometimes
8 rightly characterized, sometimes not so rightly
9 characterized, bald assertions or bald conclusions asserted
10 and that if -- in other words, if a judge says, well, that
11 really isn't a factual allegation, it's baldly asserted,
12 that seems to be a phrase people like to use, legal
13 conclusion -- and, of course, obviously the two of you
14 disagree quite significantly today in how you describe the
15 complaint. But, yes, there are certain -- that's an issue
16 in almost every Rule 12 case.

17 MS. FREEMAN: I think what Your Honor is referring
18 to is a statement -- among others, one of the statements in
19 Iqbal that the court is not bound to accept as true legal
20 conclusions couched as factual allegation.

21 Instead the Twombly-Iqbal standard requires the
22 complaint to plead facts and Twombly says in footnote 3 at
23 page 555 without factual allegation, and this might not be
24 an exact quote, without factual allegation in the complaint,
25 it's hard to see how a claimant could satisfy the

1 requirement of fair notice of the nature of the claims, but
2 also the grounds on which claims rest.

3 THE COURT: Well, again, I keep saying I'm not
4 going to interrupt you, but I think you'd probably all agree
5 to another thing and I'm not so sure this wasn't -- a lot of
6 us feel this was the law before, what I am about to say,
7 before Iqbal-Twombly and in this case you probably both
8 aren't going to -- you probably are both going to agree with
9 this. You're just going to disagree on describing the
10 complaint. In other words, do the factual allegations give
11 rise to -- well, nowadays the word "plausible inference" is
12 used more than "reasonable inference," I guess, but they're
13 pretty much tantamount to one another. And here, of course,
14 I think you've got plaintiff's counsel saying there are
15 plausible and reasonable inferences and you're saying, oh,
16 no, there's not. In fact, you've raised -- you
17 significantly focus in on that in the reply brief. So
18 that's kind of where -- and I know I interrupted you, but
19 that's kind of where the two of you part company. So
20 obviously I'm going to have to say yes or no to that.

21 MS. FREEMAN: That's correct, Your Honor. Twombly
22 at page 555 explains that the obligation to provide grounds
23 of entitlement to relief requires more than labels and
24 conclusions.

25 THE COURT: True.

1 MS. FREEMAN: Thank you, Your Honor. It also
2 says, "...formulaic recitation of the elements of a cause of
3 action will not do," and Iqbal says something very similar
4 on page 678.

5 Finally, this is another thing that Your Honor has
6 already mentioned, obviously familiar with it, Iqbal at 678
7 explains that naked assertions devoid of factual enhancement
8 do not suffice.

9 (Coughing)

10 MS. FREEMAN: Excuse me, Your Honor.

11 THE COURT: If you need to get some water or
12 something, feel free.

13 MS. FREEMAN: I'm okay for now, but thank you for
14 offering.

15 THE COURT: All right.

16 MS. FREEMAN: So TA Instruments believes and
17 explains in its motion to dismiss that most of BDC's
18 allegations with respect to any of the asserted claims
19 amount to naked assertions devoid of factual enhancement and
20 therefore the pleadings with respect to the claim elements
21 do not suffice.

22 As Your Honor well knows, infringement requires an
23 accused product or process to satisfy every limitation of at
24 least one patent claim. The Federal Circuit has explained
25 the failure to meet a single limitation is sufficient to

1 negate infringement of a claim. That's Laitram from 1999.

2 Courts applying the Twombly-Iqbal standard to
3 patent infringement claims have required plaintiffs to set
4 forth sufficient facts to plausibly allege that the accused
5 product embodies every limitation in a particular asserted
6 claim. That's a quote from Oil-Dri, but in the opening
7 brief on this motion on page 5 we identify eight cases in
8 support of that position.

9 Failure to plead accused products or a process
10 that meet all the limitations of at least one patent claim
11 is a valid reason for dismissal at the pleading stage and
12 for support for that Your Honor can refer to Lyda v. CBS,
13 which is a 2016 Federal Circuit case in which dismissal was
14 affirmed because there were no allegations that could form
15 the basis of a reasonable inference that each claim step was
16 performed. On pages 8 through 9 of the reply brief we cite
17 a bunch of other cases for that.

18 In its opposition BDC doesn't really seem to
19 dispute that it has failed to put forward sufficient facts
20 to show that every limitation of at least one claim of each
21 patent is met by the accused exemplary product.

22 Instead they seem to rely on case law and in
23 particular BDC suggests that a lower standard applies based
24 on a few exceptional cases where secrecy was a problem.
25 Those cases are Windy City, InCom, and Gracernote. Those are

1 all district court cases.

2 All of those three cases were cases involving
3 software or software products and software presents a
4 difficult situation where you pretty much have a black box
5 to the outside world, so it's hard to relate what's going on
6 in the black box to a patent claim.

7 Here the ElectroForce DuraPulse heart valve test
8 instrument is the opposite of a black box. Again referring
9 to Exhibit E, at page 22 the DuraPulse heart valve test
10 instrument is described as having transparent, quick-open
11 chambers that provide visibility from all vantage points.
12 So that is literally the opposite of a black box.

13 Moreover, secrecy is not a challenge for BDC here
14 and that is obvious from the complaint itself. BDC has been
15 aware of the DuraPulse heart valve test instrument since
16 July 2014. You can refer to the complaint at paragraph 16
17 for that. BDC alleges that infringement began in December
18 2015. That's at paragraph 20 of the complaint. So based on
19 that information, we must understand that BDC was aware of
20 the DuraPulse heart valve test instrument for at least a
21 year and a half before it was offered for sale.

22 In February 2016 BDC wrote TA Instruments
23 regarding infringement by the DuraPulse heart valve test
24 instrument and provided the numbers of the asserted patents.
25 That's in the complaint at paragraph 16.

1 THE COURT: Right.

2 MS. FREEMAN: BDC also contends that
3 TA Instruments has been advertising the DuraPulse heart
4 valve test instrument since at least December 2015. That's
5 in the complaint at paragraph 14. And BDC cites the
6 advertisements as the basis for its allegations. You can
7 see that, for example, in paragraphs 12 and 15 of the
8 complaint.

9 So there is no reasonable basis for BDC to apply
10 case law which deals with an exceptional circumstance where
11 secrecy is a problem for the plaintiff trying to satisfy the
12 pleading standard. In fact, BDC has no problems with regard
13 to secrecy. They are able to get everything they need. In
14 fact, they have argued that.

15 So if we turn to the reply brief in which BDC has
16 quoted its -- sorry. They have quoted their assertions with
17 respect to each of the patents and if you look at their
18 assertions, again, quoted in the opposition on page --
19 beginning on page 8 and going through page 9, and you
20 compare them to the patents, you can see that there's almost
21 nothing that they allege with regard to the asserted claims
22 that goes beyond the actual language of the asserted claims.
23 In fact, they don't even necessarily cover all of -- the
24 entirety of the language of the asserted claims.

25 So let's look, for example, at the '538 Patent.

1 They assert independent claims 1 and 6. Let's start with 1.
2 So 1 is a test system -- I'm just reading claim 1 of the
3 '538 Patent -- is a test system for simultaneous accelerated
4 cyclic testing of one or more valved prosthetic devices
5 comprising a test chamber, a signal generator that outputs a
6 non-regular waveform over a cycle for controlling a rate of
7 change of a differential pressure load across the one or
8 more valved prosthetic devices during a cycle. Let's just
9 stop there and turn to the allegations with regard to that
10 claim.

11 So, for example, BDC says in paragraph 22 of the
12 complaint, "The DuraPulse is a system for performing
13 accelerated testing of valved prosthetic devices. It has a
14 test chamber." That so far seems to be a repetition of the
15 claim language, just putting "the DuraPulse" at the
16 beginning of the claim language. That is a legal conclusion
17 without any facts to support it. It's just a legal
18 conclusion masquerading as a factual allegation.

19 But let's turn to the third sentence. It says,
20 "It generates a non-regular waveform used to test a
21 prosthetic heart valve." Okay. So by "it" presumably they
22 mean the DuraPulse. They're not particularly clear.

23 Plus it says, "It generates a non-regular
24 waveform" and the claim requires a signal generator that
25 outputs a non-regular waveform. BDC does not provide any

1 notice of what it may consider to be a signal generator.
2 Presumably they should have a good-faith belief that
3 DuraPulse has a signal generator, but it does not provide
4 any fair notice of the grounds for its belief that DuraPulse
5 has a signal generator or what it means by signal generator
6 with respect to the DuraPulse.

7 Additionally, moving on to -- hold on just a
8 minute.

9 (Pause)

10 MS. FREEMAN: BDC also asserts claim 10 of the
11 '538 Patent and claim 10 requires -- this is about the
12 third -- this is in the second step. Claim 10 is a method.
13 Claim 10 requires driving a motor acyclically. BDC does not
14 even assert that the DuraPulse heart valve test instrument
15 drives a motor acyclically. So TA Instruments has no
16 notice, if even BDC believes that to be true, nor do we know
17 what BDC might mean by that.

18 Looking at the first step of claim 10, it requires
19 generating an asymmetric waveform. If you look at Exhibit E
20 to the complaint, on page 10 Exhibit E says purely symmetric
21 pulsation is provided by ElectroForce motors. That seems to
22 directly contradict assertions related to claim 10 of the
23 '538 Patent.

24 Turning to the '708 Patent, the '708 Patent is
25 directed to a test chamber for accelerated cyclic testing of

1 a valved prosthetic device in a variable pressurized
2 environment. It comprises -- and I am just going by the
3 claim 17 language. BDC has asserted claim 17. Claim 17
4 requires a fluid distribution chamber having a first
5 manifold defining a first port configured to receive and
6 fluidicly couple with a first end of a sample holder and a
7 lower face defining an aperture for communicating with a
8 fluid pressure source. And then it also requires a fluid
9 return chamber -- sorry, a fluid return conduit both
10 structurally and fluidicly connected to the fluid
11 distribution chamber.

12 So if you read through BDC's allegations with
13 respect to claim 17, first of all, it very, very closely
14 follows and mostly is using exactly the language of
15 claim 17. However, if you look at it carefully, I do not
16 see honestly -- I may have missed this, I keep looking and
17 looking, but I do not see any reference to a fluid return
18 conduit. I'm looking, like, for the 17th time. I just
19 don't see any mention of a fluid return conduit.

20 Plus, the way BDC presents its allegations, it
21 says, and I quote, "It has a fluid distribution chamber."
22 The claims obviously require a fluid distribution chamber.
23 A statement that it has a fluid distribution chamber is
24 clearly a bald legal conclusion that is offered to -- that
25 is not entitled to the assumption of truth and should be

1 disregarded.

2 Turning now to the next patent, Patent '224, it
3 has one independent claim. That is the asserted independent
4 claim. So here again the allegations almost -- they do
5 refer to a particular range of rates and TA Instruments
6 concedes that is a factual allegation. However, the rest of
7 it is really just a bald legal conclusion unadorned by
8 factual assertions.

9 Moreover, claim 1 of the '224 Patent requires
10 driving a test system fluid cyclically. I don't think they
11 even mention that word. Possibly they hope the Court will
12 infer that that is somehow met by its bald legal
13 conclusions. I don't know how.

14 But I note that claim 10 of the '538 Patent
15 requires driving a motor acyclically. So to the extent one
16 were inclined to infer that something were cyclic, one
17 couldn't also plausibly infer that it was also acyclic.

18 Turning now to -- let me just clarify a little
19 bit. BDC bases all of its exemplary allegations to the
20 DuraPulse, which it defines as the DuraPulse heart valve
21 test. We presume they're referring to the ElectroForce
22 DuraPulse heart valve test instrument and that is used as
23 the single example that it applies for each of the different
24 patents. So to the extent that an inference were made for
25 one, the opposite inference couldn't also plausibly at the

1 same time be true of the same instrument.

2 Turning now to the '935 Patent, a similar
3 situation exists. You have -- hold on just a moment.

4 (Pause)

5 MS. FREEMAN: The first element of the '935,
6 claim 1, patent claim 1, requires a pressure source
7 configured to drive a test system fluid cyclically. There
8 is no allegation that I see in BDC's assertions regarding
9 the '935 patent claims that anything is done cyclically.

10 If you look at the remainder of the allegations,
11 with the exception of the range of rates, which we agree is
12 a factual allegation, almost everything is just a bare legal
13 conclusion unadorned by a factual assertion and for that
14 reason, Your Honor, we ask you to dismiss the complaint.

15 THE COURT: All right. There will be time for --
16 sometimes a judge selfishly likes some rebuttal and
17 surrebuttal, depending on where in this case plaintiff --
18 one question for you before I have plaintiff's counsel come
19 up and, again, it's not unique to -- and maybe one or more
20 of you will say, well, there's some things that should be
21 unique to this motion in a patent case, but one question
22 that comes up in almost every Rule 12 scenario is, well,
23 let's just say, for example, whether the Court -- if the
24 Court is going to be granting in whole or in part your
25 motion, I think I know what you are going to say, but

1 obviously there's issues of with or without prejudice with
2 leave to amend. Do you wish to give me your view on that?

3 MS. FREEMAN: Our position is that prejudice would
4 be premature.

5 THE COURT: All right. Thank you. I'll hear from
6 plaintiff's counsel.

7 MS. FREEMAN: Thank you, Your Honor.

8 THE COURT: Thank you. There will be time for
9 rebuttal.

10 Are you disappointed that there's no snow on the
11 ground up here?

12 MR. TAMKIN: I am not disappointed that there's no
13 snow on the ground. I'm from Denver, Colorado. In Denver,
14 Colorado, we also don't have snow on the ground, but we hope
15 to have it in the mountains this coming weekend.

16 THE COURT: Yes.

17 MR. TAMKIN: Like you, we have been unusually warm
18 and so we just don't have the amount of snow, but I have a
19 feeling -- it's December 1st -- it will come.

20 THE COURT: And I think you're the first one in
21 the room to say the word "December" today too.

22 MR. TAMKIN: If I may have just a moment, Your
23 Honor?

24 (Pause)

25 MR. TAMKIN: Good morning again, Your Honor.

1 THE COURT: Good morning.

2 MR. TAMKIN: My name is Greg Tamkin. I represent
3 the plaintiff in this case, BDC Labs, which I will refer to
4 either as BDC or BDC Labs from time to time.

5 THE COURT: Fair enough.

6 MR. TAMKIN: I want to be brief because what I've
7 heard for the most part this morning is an argument that one
8 often hears when there is a challenge to the sufficiency of
9 one's disclosures under the local rules or sometimes an
10 argument that one hears on a motion for summary judgment
11 concerning infringement, has there been proof of this
12 element or that element, is the proof sufficient, is there
13 enough of an allegation, a tie between what's out there on
14 the market and what is in the documents that have been
15 submitted.

16 Taking a step back, Your Honor, this is a
17 complaint. This is a complaint and under Iqbal and Twombly
18 it's supposed to provide a plausible basis for a claim.
19 There's no question this complaint does that. This is not a
20 Form 18 complaint that was abandoned in 2015. This is a
21 complaint with detailed factual allegations. Frankly, often
22 in my patent complaints I don't include a citation to
23 evidence that supports exactly where the factual allegation
24 came from, but these are factual allegations.

25 And the argument that I'm hearing is what is the

1 difference, what is a factual allegation versus a legal
2 conclusion. A legal conclusion is you infringe. A legal
3 conclusion is you breached a duty. A legal conclusion is
4 you breached the contract.

5 Here there are facts set forth and what the
6 defense counsel is stating is that the way the facts are set
7 forth, because they use language in the patent, that somehow
8 turns it into a legal conclusion.

9 And in this case the patent is somewhat
10 complicated. It involves waveforms and signal generators
11 and things of that nature. Let's take a patent that --
12 theoretically a patent that I would write on the coffee urn
13 in front of you.

14 THE COURT: All right.

15 MR. TAMKIN: It would be an urn that has the
16 following elements: a handle, a plastic lid, a metal body,
17 and let's assume a heating element. Okay? Those would be
18 four things.

19 How would I describe the fact that that patent
20 that describes the product, the unique invention, how would
21 I describe that your urn in front of you, your coffee pot or
22 water jug in front of you infringes? I would say it has a
23 handle. That's not a legal conclusion. I've just used the
24 language in my claim. I would say it has a plastic lid
25 because I can see it's a plastic lid. I would say it has a

1 metal body because I can see that it's a metal body. I
2 wouldn't describe in any more detail than that. And that's
3 what's been done in this particular case.

4 If you look at it and you look at the claims --
5 and I'll just take two of them because I don't think it
6 really matters. I'm going to start with paragraph 22 of the
7 complaint because it refers to '538.

8 THE COURT: Okay.

9 MR. TAMKIN: Well, paragraph 22 I went through and
10 said what factual allegations are in that paragraph 22 and I
11 just did this this morning. I wrote them down. Well, the
12 first factual allegation is that this product performs
13 accelerated testing. Next factual allegation, the product,
14 looking at it, has a test chamber. Next factual allegation,
15 the product generates a non-regular waveform for testing a
16 device. Next fact is there is a drive motor that has been
17 alleged. Next fact is there's a fluid displacement member.
18 Next fact is it is driven based on a non-regular waveform,
19 which, by the way, is software. We'll get there in a few
20 minutes. But the point is those are all very specific,
21 broken-down, small facts.

22 I'll do the same thing just to skip to, say, the
23 '935 patent because it's a pretty different patent than the
24 first -- the first two and the second two are sort of
25 different --

1 THE COURT: Right.

2 MR. TAMKIN: -- go to really different things, but
3 those two are -- those four, they are two sort of pairs, if
4 you will.

5 And so I looked at paragraph 54 and paragraph 54,
6 again I went and looked at what are the factual allegations.
7 This device performs accelerated testing of valved
8 prosthetic devices, heart valves, for example. There's a
9 pressure source. It drives above the normal range of a
10 heartbeat. In fact, as counsel said, it drives between --
11 it can drive between 900 beats per minute and I think it's
12 twice that or 1,800 beats per minute. There's a
13 pressurizable chamber. You can look at the documents and
14 there's a pressurizable chamber. There's fluid in the
15 chamber. You can look at the video that we cited and see in
16 that video it shows there's fluid and stated that's a fact.
17 There are two sides of that device. You can see that and
18 that's been stated in the claim. They are in fluid
19 communication. Obviously there has to be a way that they're
20 in communication, which is fluid communication with the
21 pressure source. There has to be a way for there to be two
22 sides of the device that would be in fluid communication.
23 There's also what's called an excess volume area for storing
24 fluid when compressed and there is -- you can look at the
25 product and you can say, oh, look, there's an area where

1 there's not fluid, an excess volume area. It's not all the
2 way full. And when you see it's driven, that would be
3 compressed. You can see it when it actually happens.

4 Those are facts. You're looking at something and
5 you're describing it. Just like when I described your urn,
6 I can see it's metal, I can see it's plastic on the top, I
7 can tap it and see that it's plastic on the top. That's a
8 fact. That's not a legal conclusion. A legal conclusion is
9 there is infringement or there is contributory infringement
10 or there is inducement of infringement, things of that
11 nature.

12 THE COURT: Now, it may not be related to what you
13 just said, but obviously you heard counsel state and I had
14 asked a question that was extensively briefed and I'm quite
15 certain I know what you are going to say, but they say, not
16 only in your pleadings, but to actually apply it to the
17 written submissions as well, they say we have no idea which
18 product or products actually is accused of infringing.

19 MR. TAMKIN: Sure. It's hard to believe that
20 that's actually a fair statement. The complaint
21 specifically describes the DuraPulse throughout and the
22 DuraPulse is defined, I want to say, in paragraph 5. Let me
23 see if I can find it here in my notes. But the DuraPulse is
24 specifically -- I'm sorry, it's in paragraph 13 -- is
25 specifically defined as a DuraPulse heart valve test

1 instrument. This is about the DuraPulse heart valve test
2 instrument. There's no question in here. All of the
3 examples, all of the documents that we're referencing are
4 that. It relates to -- as counsel even indicated, it
5 relates to testing of heart valve devices.

6 THE COURT: I think they're saying, well, are
7 the plaintiff's -- I think their question was are the
8 plaintiff's, I'll use their phrase, instrumentalities
9 limited to the, and I think I can read my writing, the
10 ElectroForce DuraPulse heart valve test instrument.

11 MR. TAMKIN: I think so. I think that's what it
12 says. The problem is that we don't know, Your Honor, is I
13 don't know when I'm drafting a complaint how the defendants
14 describe their products. I don't know the secret name they
15 use. And that's what the court, Judge Rogers, talked about
16 in the Windy City case. We don't know exactly how the other
17 side is or one side is going to describe their products.
18 And there they described Skype and they described a few
19 other of these software products and did them very
20 generally, and at the initial stage the court found that was
21 fine. You can describe them in general because there was
22 some evidence about what those products were doing. It's
23 the products that do that.

24 And here the plaintiff is not charged with knowing
25 the precise nomenclature of the defendant. I mean,

1 obviously we're up here talking about the ElectroForce that
2 apparently was invented or coined -- the term is "coined" --
3 in 2002. I don't think that anybody really thinks that if
4 we're dealing with a patent that takes priority in 2009
5 we're accusing something from 2002 of infringement. We
6 wouldn't be here. Nobody -- everybody recognizes that.

7 So I think it is disingenuous or a stretch, at
8 least, for the defense to claim they don't know what this
9 case is about. Are they on notice of what product we're
10 talking about? There's four different patents at issue.
11 Each of those claims -- more than that many claims, but each
12 of the claims goes through and talks about the DuraPulse
13 heart test value instrument.

14 Now, I think as best I can characterize it, that
15 if we would have left out paragraph -- if we would have
16 reordered the first paragraph that talks about in general
17 and kept in the second paragraph that talk about the product
18 specifics and put that more general statement at the end,
19 then it might not have been as confusing. I'm not really
20 sure that's the appropriate way to read a complaint.

21 So getting back to sort of the bottom line of the
22 issue is there are extensive factual allegations. Not only
23 are there extensive factual allegations, but those factual
24 allegations are not just bald-faced, made-up.

25 Now, frankly, I don't think there is a requirement

1 whatsoever that the plaintiff would have had to cite to
2 where its support is for the fact that it's making. I don't
3 think there's a requirement that you attach that. I don't
4 think there's a requirement that you cite to it.

5 That being said, there's a myriad of cites
6 throughout and there's cites to, number one, that Exhibit E
7 to the complaint and, number two, there's cites to a
8 specific brochure. That brochure, I apologize, was not
9 attached to the complaint, but is certainly referenced in
10 the complaint and certainly was provided.

11 But to the extent that there's any question about
12 the notice, certainly those documents that are referenced
13 would be something that can be included and specifically
14 there's specific references to what is at issue.

15 But turning to the law and what needs to be done
16 in this case, you need to state factual allegations. You
17 need to state that there is a patent, that the patent has
18 been infringed, and how -- what the accused instrumentality
19 is or accused device is and the functions and the ways that
20 it's infringing. All of that is done through factual
21 statements about what that device has.

22 Now, I mentioned earlier that the device in
23 question has a number of elements. It's not as simple as my
24 coffee urn example. It has both software and it has
25 hardware.

1 And certainly there are transparent portions, it's
2 a glass or plastic box that you can see in, but there's also
3 you're driving a waveform and there's a motor in there and
4 it drives based on a signal and that signal is represented
5 and described in those materials and that's what is actually
6 cited, but those -- and we'll get here some other day, but
7 an expert has looked at that and made various different
8 statements.

9 Just as an aside, it's interesting that we're
10 here and I know that this is premature, but obviously
11 there's been a lot of work done. There was a motion for a
12 preliminary injunction filed. There is an expert affidavit.
13 It would -- ultimately what we would be doing is -- I ask:
14 What happens if the Court does grant the motion and grants
15 it without prejudice to re-amend? What would I do? Would I
16 then simply submit the expert declaration and affidavit and
17 say, well, here's -- are these different facts?

18 Certainly the expert is going to describe many of
19 the things the same way. The expert is going to say about
20 the coffee cup -- or coffee urn there's a handle. The
21 expert is going to say that here there's a fluid chamber or
22 there's an excess volume chamber. That's something that the
23 expert is going to see, but those are facts and they're not
24 legal conclusions.

25 But in any event, with respect to the application

1 of those cases, first, the cases that are cited, they are
2 district court cases, I agree, but they are well-respected
3 district court cases. I think everybody agrees that the
4 Windy City case is authority. It's cited around the
5 country, Judge Rogers' opinion.

6 THE COURT: Some of these are Rule 12 motions.
7 Some of them, the cases that you have each cited, are
8 summary judgment decisions too.

9 MR. TAMKIN: I think for the most part we've tried
10 to cite Rule 12 decisions.

11 THE COURT: Right, but that's -- it's not the
12 first Rule 12 motion where obviously a variety of cases on
13 similar issues are discussed because that becomes an issue
14 of, well, yes, these are maybe legitimate issues, but it
15 should be done at the Rule 56 stage, not the Rule 12 stage,
16 and the list goes on.

17 MR. TAMKIN: Correct. And we certainly think that
18 if there's an issue with whether or not we have proven that
19 there is a conduit or something like that, that's for a
20 different day.

21 But if you look at the allegations in the Windy
22 City case or some of the other cases we cited, those
23 allegations are very broad. They do the best that the
24 plaintiff can. Here I think we've done a lot more than
25 that.

1 But I also think to the extent that counsel
2 indicates that the Windy City case is about software, this
3 is about software too. Certainly it's a box, certainly
4 there are things in the box, there's chambers, but there's
5 also a waveform and driving that waveform and there is some
6 software involved.

7 But in any event, the Windy City case requires
8 that you describe the product, you identify the product.
9 The DuraPulse is described -- or the DuraPulse heart valve
10 test product is described and there's details about exactly
11 how it infringes.

12 Because we use language that is similar to the
13 language in the patent, that doesn't mean it is a legal
14 conclusion. I think -- it would be interesting because
15 imagine, Your Honor, if instead of using language that is in
16 the patent we tried to describe it in ways that wasn't the
17 language in the patent. Then I presume I would be here
18 trying to defend against the fact that I haven't really
19 connected up the patents-at-issue with my description of the
20 product. So one way or the other I'm stuck.

21 So I think the standard of the Windy City case is
22 met, but I also want to refer to one other thing in the
23 Windy City case that is also raised in I think it's the
24 Telebrands case that's cited in the brief, which is a
25 District of New Jersey case that's noting that Windy City

1 and InCom are cases important to follow. That's a District
2 of New Jersey case. It's a Lexis cite, but 2016 Lexis
3 114436 at 14 and 15.

4 In that case it notes that there is this interplay
5 between the local rules that Your Honor addressed early on
6 versus the complaint. And the local rules don't in any way,
7 shape, or form change the pleading requirements, I agree,
8 but the local rules inform, in all these districts all over
9 the country now, inform us on how those pleading
10 requirements are interpreted.

11 And what the Telebrands case specifically said is,
12 just like Judge Rogers in the Windy City case indicated,
13 that the appropriate time for the detailed allegations and
14 the citations and the heightened standard is in the local
15 rules, it's not here, and we're informed by the local rules
16 that require a much more detailed set of allegations once
17 you do your infringement contentions.

18 THE COURT: Claim charts, for example.

19 MR. TAMKIN: Claim charts, exactly. This,
20 frankly, is pretty close to a claim chart, but I would say
21 it's not exactly a claim chart by any stretch. It doesn't
22 have pictures or things like that.

23 But certainly there's a time for claim charts and
24 the time for claim charts is not here. Here what we have
25 done is we have set forth the details and described the

1 product itself.

2 Absolutely we've used the language of the patent,
3 but there's nothing wrong with using the language of the
4 patent. Using the language of the patent doesn't mean it's
5 a legal conclusion. Patents use descriptive language and
6 state facts. If it says it has to have a chamber, what
7 would I say other than it has a chamber? It doesn't make it
8 a legal conclusion just because the language is in the
9 patent.

10 But getting back to my point on the claim charts,
11 this is not a time for claim charts. This is not a
12 question of the sufficiency of the defendant's claim chart
13 at all.

14 And so the only other question is the one I think
15 Your Honor raised that we've addressed, which is is there a
16 product that is known here, is there disclosure, is there
17 notice in this complaint.

18 THE COURT: Well, not to interrupt you, but then
19 of course a phrase, and it was addressed today by opposing
20 counsel, but a phrase that is said a number of different
21 ways saying, well, plaintiff must have set forth -- alleged
22 that the accused product embodies every limitation in at
23 least one particular claim and they're saying that was not
24 done here.

25 MR. TAMKIN: Well, first of all, that's not the

1 law. That is -- of course we all agree that the law is in
2 order to infringe a claim, you have to satisfy all the
3 elements, but the law is not that you have to describe every
4 single claim.

5 But every element of a claim of each of these
6 patents was clearly set forth in the document. So, for
7 example, you can take claim 1 of the '538 Patent. Easy also
8 to take claim 9 -- excuse me, the claim cited of the '935
9 Patent. But you can go look and compare, Your Honor. There
10 are elements of every single one of those claims set forth.

11 Now, certainly there was some argument about some
12 things are done cyclically, some things are not done
13 cyclically when you do certain -- I think counsel even
14 argued that there was something that was a pure sinusoidal
15 waveform or something like that which would be cyclical, an
16 asymmetric wave would potentially -- or is acyclical. You
17 don't have to repeat things that you have already said. If
18 you've described an asymmetric waveform, is that going to be
19 acyclical? Yes. If you've described something as cyclical,
20 it's going to be something different.

21 These products are capable of doing multiple
22 different things, certainly, and being set different ways
23 and we've described that and we've shown the pictures and
24 we've identified the pictures of those various different
25 documents. But certainly one of the elements of all of the

1 claims are -- all of the elements of one of the claims of
2 each of the patents is particularly described.

3 And, again, Your Honor, if we use all the words of
4 the patent -- we're criticized in this case for not using
5 all of the words in the patent, but at the same time we're
6 criticized if we do use the words of the patent. So you
7 can't win.

8 But if you look at the InCom case, the InCom case
9 is pretty telling on that point too. In that case the court
10 said they generally describe the functionality. You don't
11 have to describe every element. You have to describe the
12 functionality of the product and how that product operates,
13 and that's absolutely what we did.

14 So if you follow the InCom case -- in the InCom
15 case there was a novel patent. This case is a novel patent.
16 There's some various different features and you have all
17 those features. We've described those. That functionality
18 of the product and how it infringes the patent is described
19 and that's really what has to be met there.

20 We were told that we have an hour and --

21 THE COURT: We're fine.

22 MR. TAMKIN: Oh, okay.

23 THE COURT: Obviously I'm not going to turn off
24 the lights. Take the time you need.

25 MR. TAMKIN: I do hate to be the one that is

1 standing between everybody in the room and their lunch.

2 THE COURT: Of course, what is well-known in this
3 building, and that's why sometimes I have to be vigilant for
4 lawyers and court reporters and all staff, is I know it's
5 not good for you, but I never eat lunch. That's usually not
6 an incentive for me to shut the door down.

7 MR. TAMKIN: Good to know for future reference,
8 Your Honor. With that I will simply say this is -- again,
9 to summarize my argument, unless the Court has any further
10 questions, to summarize my argument, this is the pleading
11 stage. Iqbal and Twombly require setting forth facts to
12 create a plausible case of infringement. There's little
13 question here that there is a plausible case for
14 infringement.

15 The real question that I am left with is everybody
16 agrees that if the Court were to dismiss this, it would be a
17 dismissal without prejudice to allow an amendment. What
18 would the amendment look like? Would I state more things?
19 Would you want me to add more information about each of the
20 individual elements? Likewise, would I state -- would I
21 provide an expert affidavit? How much more do you need? Do
22 I need to use different words to describe the same facts
23 because my words were too close to the patent? That doesn't
24 seem to make a lot of sense here.

25 This is a case that should move forward and

1 there's no reason not to based on these allegations. I know
2 we're slightly past this stage in terms of the current
3 jurisprudence, but there was a concept of notice pleading.
4 There is little question here that notice pleading is beyond
5 satisfied, but, in fact, it's beyond notice pleading.
6 There's a reasonable inference, to Your Honor's expression.
7 Clearly a plausible case for infringement has been made.
8 This is not a time when we need to set forth the
9 infringement contentions. We will do that soon enough.
10 And, frankly, as the Court knows, at least for the patents
11 at issue in the preliminary injunction motion, which we'll
12 talk about shortly, the scheduling anyway, that's -- we're
13 well past that and I think everybody is on notice. I think
14 it's time to get this case moving along and the motion
15 should be denied.

16 Thank you, Your Honor.

17 THE COURT: I will likely give you the last word
18 after I hear some brief rebuttal from opposing counsel.

19 MR. TAMKIN: Okay. Thank you.

20 THE COURT: That doesn't mean you're obligated to
21 give rebuttal, but I may have had one or two cases over the
22 years where people decline to give rebuttal, maybe one, but
23 I can't -- that's rare.

24 MS. FREEMAN: Thank you, Your Honor. I would like
25 to provide rebuttal.

1 Let's start with BDC's new allegation that
2 obviously their complaint is limited to the heart valve test
3 instrument. Apparently they believe we should interpret
4 their complaint in a way that they believe is reasonable. I
5 don't know how we should know what they think is reasonable
6 and they may not agree on what we believe is reasonable. So
7 we think that they should say what they mean and not expect
8 us to provide some interpretation which they believe is
9 reasonable.

10 Let's talk about DuraPulse. You specifically
11 asked them if the complaint is limited to the DuraPulse
12 heart valve test instrument and I think they said I think
13 so, maybe there's a secret name. They still were not pinned
14 down, Your Honor. They did not say, yes, it is. So we
15 still don't know, even after hearing them, whether the
16 complaint is limited to the DuraPulse heart valve test
17 instrument.

18 In the complaint on paragraph 13 BDC says, "The
19 ElectroForce line includes products," which is a plural
20 word, "for performing accelerated testing of heart valve
21 devices, including the DuraPulse Heart Valve Test
22 ('DuraPulse')." "

23 And then from there they provide -- let me turn
24 Your Honor's attention to paragraph 21 of the complaint.
25 Well, actually at 20 they talk about infringing products and

1 then on 21 they say, and I quote, "for example, and without
2 limitation, the DuraPulse."

3 So they expressly -- the complaint expressly is
4 not limited to the DuraPulse. If BDC wants to limit their
5 complaint to the DuraPulse, they're obviously free to do so.
6 We can't write BDC's complaint for them. We don't want to.
7 We just want them to be clear so that we know what the
8 accused products are.

9 In its oral argument BDC argued that there's no
10 question that they have provided detailed factual arguments.
11 There absolutely is a question, Your Honor.

12 THE COURT: Obviously I'm going to have to agree
13 or disagree with one of you because you've each described
14 the complaint quite differently.

15 MS. FREEMAN: Yes, Your Honor.

16 THE COURT: That much we can agree on, I think.

17 MS. FREEMAN: Even if you give them the benefit of
18 the doubt as to any software that's involved in the
19 DuraPulse heart valve test instrument, they still haven't
20 even come close to providing factual allegations as to the
21 transparent. Most of the product is transparent and you can
22 highly -- it's made to be extremely visible and clear
23 exactly what's going on in the product. And BDC just hasn't
24 even made any effort to explain what they're talking about
25 to give TA Instruments fair notice of the grounds.

1 Under TA -- sorry. Under BDC's theory what they
2 could do is they could just choose a claim, choose a
3 product, let's say DuraPulse, even though DuraPulse is a
4 trademark, so we'll say the DuraPulse product, and they
5 could say "is" and they could recite just exactly a claim.
6 According to BDC, that is all that is required. And that is
7 specifically rejected by the Supreme Court already.
8 "...formulaic recitation of the elements of a cause of
9 action will not do." That is exactly what BDC is doing
10 here.

11 At most what they've done is they've broken up the
12 claim into a number of pieces and talked about most of the
13 pieces, not even all of the pieces in every case. So
14 claim 1 requires a test chamber. They say something like
15 DuraPulse has a test chamber. That is nothing more than a
16 formulaic recitation of the cause of action and the Supreme
17 Court says that will not do.

18 So let me just go one step further into the
19 ridiculousness of BDC's position. They're saying, well, we
20 can just -- actually under BDC's theory we have to use the
21 claim language, so we can just use that claim language and,
22 hey, we can include a reference to the Internet, so we've
23 got everything in the claim and we're just using that exact
24 language, so we're good and, hey, you know it's a fact
25 because we refer to the Internet. That is absolutely not

1 sufficient for a pleading standard. It doesn't provide
2 notice of the grounds that BDC is relying on as to what they
3 believe constitutes infringement.

4 They can see -- I think BDC has admitted that
5 they've actually seen the DuraPulse heart valve test
6 instrument in operation. They don't suggest that there is
7 a deficiency in the publicly-available information on that,
8 on the product, and yet they believe that the Court
9 should go by cases in which there was a deficiency of
10 publicly-available information.

11 Again, the cases that BDC relies on are
12 exceptional cases. Even if you give them the exception for
13 any software that's involved in the DuraPulse heart valve
14 test instrument, that would not apply to the completely
15 transparent and highly-visible portions of the device where
16 you can actually see what's going on in the product and it's
17 designed so you can clearly see from all different angles
18 what's going on in the product. That has nothing to do with
19 software. And as to those parts of the claims, BDC has said
20 nothing that is more than a simple recitation of claim
21 language.

22 Also, Your Honor, we would direct the Court to
23 Robern and e.Digital, which are the more favored, in our
24 view, cases. Plus, this Court is bound by Supreme Court and
25 the Federal Circuit. Other district court cases can be

1 interesting, they might be persuasive, but the Court is
2 bound by the Supreme Court and the Federal Circuit.

3 THE COURT: Without a doubt. Without a doubt even
4 though the Federal Circuit hasn't done so well with the
5 Supreme Court either in the last couple of years. We have
6 about a 60 percent plus reversal rate of our Markman hearing
7 orders --

8 MS. FREEMAN: Oh, no.

9 THE COURT: -- the trial bench in the country,
10 with the circuit and I think the circuit's numbers are
11 actually over 80 percent reversal rate by the U.S. Supreme
12 Court, so.

13 MS. FREEMAN: BDC talks about the local patent
14 rules. That's fine. Obviously we intend to comply with the
15 local patent rules, but the local patent rules really have
16 nothing to do with pleadings. We're not talking about
17 infringement contentions. We're not talking about proof.
18 We're talking about asserting facts that give rise to a
19 plausible inference that each of the elements of any claim
20 is met by the accused, quote, infringing products.

21 THE COURT: True.

22 MS. FREEMAN: That is what we're talking about.
23 We're not suggesting that there's final proof. This is not
24 a summary judgment motion. That's way premature. And we
25 believe that the patent rules are just simply not relevant.

1 This Court is to judge the pleadings based on the
2 Twombly-Iqbal pleading standard.

3 As to InCom, BDC argues that InCom is relevant.
4 InCom is definitely not relevant. In InCom there was novel
5 and unique functionality that previously had not existed.
6 There's no allegation that there's a novel and unique
7 functionality here that hadn't previously existed. So InCom
8 is not relevant. It's not on point.

9 I think unless Your Honor has any questions,
10 that's all I have.

11 THE COURT: Thank you.

12 MS. FREEMAN: Thank you, Your Honor.

13 THE COURT: Would counsel like the last word? And
14 most lawyers don't turn that down.

15 MR. TAMKIN: I was going to make a joke about
16 that.

17 THE COURT: It happens, but it's rare.

18 Thank you for your argument, Counsel.

19 MR. TAMKIN: It's probably a bad idea to give a
20 lawyer an invitation to the last word, I would agree. I
21 will be very brief. I really only want to address, I think,
22 a couple of points.

23 The first one is that there's an argument that,
24 well, really the plaintiff is saying you can just take the
25 claim language and just throw it out there and if you throw

1 it out there, that's enough and that can't be right.

2 Well, first of all, there's a difference between
3 a -- the Supreme Court said you can't set forth formulaic
4 elements of a cause of action. The formulaic elements of a
5 cause of action are different than the elements of a claim.
6 Elements of a claim -- it happens to be the same word, but
7 the elements of the claim are the parts of the claim.
8 There's five parts, say, of a claim or three parts of a
9 claim or 12 parts of a claim.

10 What the Supreme Court said is you can't set forth
11 the formulaic elements of a cause of action in that regard
12 and by that it means, you know, if -- take a negligence
13 claim. You can't set forth there's a duty, a breach,
14 proximate cause, and damages. That's what the Supreme Court
15 is saying.

16 But what we did is set forth certainly there's
17 infringement. Of course we make that allegation. I think
18 it's paragraph 20, paragraph 53, and others. But then
19 there's also the factual allegations that underpin that and
20 that's what we did.

21 Whenever you file a complaint in federal court,
22 and state courts too have similar, you're bound by Rule 11.
23 There's an ethical obligation to set forth a complaint only
24 after a good-faith belief has been identified and the facts
25 set forth therein. You must have a good-faith belief in

1 those facts. You're bound by those.

2 Here those facts exist. Those facts not only are
3 based on the good-faith belief of the signer of the
4 pleading, but they're set forth and they're cited. We're
5 not simply saying go look at the Internet and that suffices.

6 Somehow the rules are being reversed. Whereas the
7 plaintiff actually puts forth the definitive support, that
8 definitive support is being turned against the plaintiff.
9 That's not appropriate here.

10 Yes, there's a citation to the definitive support
11 to provide additional notice to the defendant exactly what
12 they're doing that infringes. At section 22 of a particular
13 invoice the defendant is doing exactly what we say they're
14 not supposed to be doing. At section 53 of that video
15 something else. That's just providing additional notice.
16 Nobody is saying, yes, see the Internet, therefore they
17 infringe. That's not what's going on here. There are facts
18 that identify how they infringe.

19 The last issue that I wanted to address is with
20 respect to the case law that's cited. There's -- please
21 read the Windy City case again. There's nowhere in the
22 Windy City case that it says that this is a unique case and
23 should only be applied in a software context. The Windy
24 City case is quite clear it applies across the board. It's
25 been cited a number of times. It's not a special

1 circumstance type of case. It simply requires that the
2 complaint -- it finds, based on what is stated in the
3 complaint, the complaint describes the accused
4 instrumentalities and the functionalities of those products
5 which allegedly infringe on the plaintiff's patents and the
6 ways in which they do that. That's all that is required.
7 That's what was done here.

8 The InCom case is apropos. It's just like any
9 other case, you describe the novelty or the uniqueness of
10 the invention. Every patent under Section 101 of the Patent
11 Act requires a patent to be novel and unique. You can't get
12 a patent if there's not a novelty or uniqueness. You
13 describe that, and the way that's described is in the
14 claims. You set forth that those claims exist, that there
15 is factual support for those claims, and that's what you
16 need to do.

17 In the InCom case they set forth in general what
18 the claims laid out and what the invention was. They
19 described the claims. They described the invention in the
20 claims and they said this product seems to do those things.
21 It was sort of on information and belief in that case, but
22 it seems to do those things, we've seen it. The InCom case
23 is relevant too. You don't need to -- under the InCom case
24 you don't need to go element by element and identify. We
25 have, in fact, done that, but you don't need to.

1 So for all those reasons the motion should be
2 denied and we should get this case moving.

3 THE COURT: Well, as I said, I'll deem the matter
4 submitted. You both describe the complaint quite
5 differently and briefed it, so I will deem that submitted.

6 Why don't we now discuss -- I suppose since you've
7 submitted the -- unless counsel have discussed it and met
8 and conferred differently, I assume I should get the
9 reaction of defense counsel on the preliminary injunction --
10 or maybe the two of you have talked -- about timing.

11 MR. TAMKIN: There was a request for an extension
12 of time to brief the response.

13 THE COURT: Right.

14 MR. TAMKIN: And I think they requested a short
15 extension of a week or two weeks, I'm not sure. Of course
16 we don't have an objection to, especially this time of year,
17 a short extension of the briefing schedule.

18 THE COURT: So what's the defense counsel's point
19 of -- maybe both of you can come on up to the podium just so
20 we can make sure that everybody can hear and get it down. I
21 guess there's a couple of issues, and I'm not going to
22 create one where there isn't one. So one is the briefing
23 schedule and two is coordination or lack thereof or its
24 relationship, if any, to the motion I've just heard --

25 MR. TAMKIN: If I --

1 THE COURT: -- separate from the issue of the
2 mediation issue I'll bring up at the end.

3 MR. TAMKIN: You know, obviously the first thing
4 that always happens in a case like -- well, often what
5 happens in a case like this there's a motion to dismiss. If
6 we had filed the preliminary injunction motion immediately, we
7 would still have been in the same boat and I presume there
8 would have been a similar motion to dismiss and so we would
9 have had to get that resolved first. So I think we're
10 getting that resolved first and once we do, we should move
11 forward with the preliminary injunction.

12 THE COURT: By reading -- and I'm not going to
13 claim I've read it super carefully, but I've got all the
14 briefs on the preliminary injunction, but by reading -- kind
15 of going through the opening brief it's obvious that, not
16 inconsistent with other preliminary injunction requests,
17 especially the way it's been requested, where you've lost
18 one competitor, that sooner rather than later.

19 MR. TAMKIN: Obviously sooner rather than later is
20 most important to us. We tried to get this case resolved a
21 couple of times before and after the complaint was filed.
22 We've been unsuccessful. I know we will talk about that
23 again momentarily.

24 THE COURT: All right.

25 MR. TAMKIN: But sooner rather than later is

1 important. The reality, though, is there's a certain
2 limited number of these that are sold a year, so the sooner
3 the better. At this point we've had to go through and brief
4 the motion to dismiss and go through that whole process. We
5 are comfortable around that. I would like to do this
6 hopefully as soon as possible, but if counsel needs a couple
7 of weeks to respond, we are where we are.

8 MS. FREEMAN: With regard to the timing of the
9 deadline of our opposition to the motion for preliminary
10 injunction, we have requested an extension. We do
11 appreciate BDC's courtesy in offering to allow us a one- to
12 two-week extension. We believe the deadline right now is
13 December 13th. A one-week extension, if I'm correct, would
14 take us to the 20th. I don't know if it's a Saturday or a
15 weekend date, but if we could get an extension to
16 December 23rd, that would be great.

17 THE COURT: I can tell you here in just --
18 somebody else will probably call it up on their phone
19 quicker. The 23rd is a Saturday.

20 MS. FREEMAN: Okay. If we could get an extension
21 to the 22nd.

22 MR. TAMKIN: Sure. We have no objection to that.

23 THE COURT: Okay. December 22nd.

24 MR. TAMKIN: Just for our expert purposes, we're
25 going to need an -- that would, I think, put our response --

1 would that put our response on the 29th or the --

2 THE COURT: Maybe you could go into maybe the end
3 of the first week in January?

4 MR. TAMKIN: Yes, that would --

5 THE COURT: I will give you a date right now.
6 That would be -- the first Friday in January, but then we
7 can discuss a different date, would be Friday, January 5th.
8 That means New Year's day is on Monday. So whether that
9 means you want to go to Monday, January 8th.

10 MR. TAMKIN: I think just because I'm worried
11 about experts being out and --

12 THE COURT: And that whole holiday time in there,
13 there's a lot of people out and about. We could begin with
14 December 22nd and Monday, January 8th, and then if people
15 get back to their offices and say, well, I wish we would
16 have known this because now we may have to get back to the
17 Court because we would have suggested some other time. So
18 that's what I'll write down here, is the 22nd and the 8th.

19 MR. TAMKIN: Thank you, Your Honor.

20 THE COURT: So where does that then -- before we
21 get to the final piece, I'm assuming, of course -- let's
22 just say, for example, and sometimes -- I'm not going to
23 watch the expression on Ms. Converse's face or other
24 chambers people because sometimes they know when we get into
25 trying to expedite things they'll say -- and I have been

1 known to do this, so people kind of knew where they stood,
2 would file rather quickly an up or down decision with the
3 memorandum and opinion to follow. Sometimes lawyers say,
4 no, we would rather get the whole thing all together, not
5 just motion granted or motion denied.

6 What I will do is after we get some further input
7 here is probably give you -- probably early next week I'll
8 give you a contact with respect to chambers. I don't think
9 it will be controversial or we'll need a short on- or
10 off-the-record telephone conference, but give you -- I'll
11 give you a date here's when I will decide the case and
12 here's when we'll coordinate the hearing.

13 Because there's another issue depending on the
14 Court's decision, and I'll try to make sure that doesn't
15 complicate either counsel or your clients. For example, in
16 a Rule 12 setting we get -- the most common result is if a
17 case is granted, it's without prejudice. Well, then that
18 kind of -- given the situation here, I'll kind of look at
19 how to coordinate all this. Obviously if the motion is
20 denied, then that doesn't create that issue. But if it's
21 granted in part, then I'll -- in other words, I'm just going
22 to sit back and take a look at things and I'll suggest a
23 schedule.

24 Probably we'll send out a short e-mail from my
25 courtroom deputy, Brenda Schaffer, to you early next week to

1 say here's how I see the schedule so you kind of know
2 exactly. Then we could then also coordinate any hearing
3 date with respect to the preliminary injunction.

4 MR. TAMKIN: That would be great.

5 THE COURT: So if you know that that's kind of the
6 timeline and worst-case scenario, which I don't think is a
7 worst case -- is such a bad scenario, if I set something up
8 and you get that sometime early to midweek next week and
9 say, whoa, we need to talk to the judge and have a short
10 telephone conference, fine, that's what we'll do and it will
11 be up to counsel whether you want it on or off the record,
12 that's not a problem.

13 So the issue, without trying to put anybody on the
14 spot, the issue of making a magistrate judge available for
15 any discussions because one or more of you in the room are
16 thinking either the time for talk is over, the judge just
17 doesn't know that, he's clueless, and we need to get some
18 decisions from him first or it would be, without anybody
19 compromising your respective positions of your clients, we
20 could make it a calendar priority and sometimes lawyers say,
21 well, we would rather talk sooner than later or we don't
22 need the assistance of the magistrate or we have our own
23 person we're dealing with.

24 What's the -- whether there's consensus, no
25 consensus or -- I can tell you right up-front I know one of

1 the criticisms across the country from some of these
2 seminars I spoke at and not just unique to patents is
3 they'll say, with or without input from the lawyers, the
4 judge just ordered us to mediation and actually then
5 requires us usually to get our own mediator and don't come
6 back, I'm going to make no decisions. I'm not going to do
7 that.

8 And I'm not -- if you could agree to some early
9 get-together with or without our help either before I make
10 any decisions or after, I mean, I can make that happen, give
11 it priority with one of our magistrates. It would be
12 ordinarily Judge Rau, but if he can't do it because of his
13 surgery -- because I've talked to both of them just this
14 week about that very issue.

15 Any thoughts? Maybe you're thinking, well, we
16 need to talk to our clients and one another or we'd
17 rather -- or maybe you are absolutely certain what the next
18 step should be here.

19 MR. TAMKIN: From our point of view, we've had
20 some -- a significant back and forth and ultimately decided,
21 okay, that didn't go anywhere, we've got to get this case
22 moving. But because we did have this significant back and
23 forth, that means we're interested in trying to get this
24 resolved. So we don't have any objection to trying to get
25 it resolved. I'm not particularly hopeful, but maybe a

1 magistrate could be helpful if the defendant thinks so.

2 MS. FREEMAN: I would have to confer with
3 TA Instruments.

4 THE COURT: And that's fair enough because I don't
5 mean to put anybody on the spot.

6 And the other thing is one of your concerns or
7 both of your concerns might be before we adjourn here is
8 what sometimes lawyers are reluctant to say is, well, that's
9 just going to put off everything else. I can make sure that
10 doesn't happen. In other words, I would acknowledge we
11 would have an obligation to expedite this and not use this
12 as an excuse, absent stipulation of the parties, to push
13 everything out, whether it's my decision on the motion or
14 preliminary injunction. No, that would defeat the whole
15 purpose of the whole thing and then it would just create
16 more expense, more delay for everybody and that doesn't
17 benefit anybody.

18 So why don't we do this, then. People can talk to
19 their respective clients, to one another. Then the real
20 issue is, well, could we get in in X number of days or weeks
21 because that may make a difference and is it going to delay
22 anything else and so then -- so we can maybe try to make
23 that decision sometime next week as well so we can kind of
24 coordinate the whole thing because it may be you reach an
25 agreement on something or it may be that, well, we need the

1 Court's decision on this before we can do this; or sometimes
2 it's just the reverse, as long as we can get in quicker and
3 sooner rather than later, maybe we can save some time and
4 expense and delay.

5 But I'll let -- I'm not going to order it. We'll
6 make it happen. I just don't think it's fair to -- my job
7 is to manage the case, not to micromanage the lawyers and
8 tell you how to represent your clients. I know that that's
9 going on in various parts around the country. I don't think
10 any of my colleagues are doing that here either.

11 So we'll just -- I'll send out a timeline next
12 week and then I'll probably just check in and then if
13 there's some agreement on what the communication should be
14 to the Court, you know, you wouldn't have to docket a
15 letter, you could just send in a letter to the Court's
16 chamber box and say, well, we've discussed it and here's
17 where we're at with that issue, if that works for everyone.

18 MR. TAMKIN: That's fine. We can --

19 THE COURT: Or if you say, well, we're at a point
20 we need some more information from the Court, can we have a
21 short conference call next week, that would be fine too.

22 MR. TAMKIN: I think we can talk to our respective
23 clients hopefully by then and then have some -- and probably
24 talk to each other and then report back to the Court.

25 THE COURT: In that context, anything further at

1 this time by plaintiff's counsel?

2 MR. TAMKIN: No, Your Honor. Thank you for your
3 time.

4 THE COURT: For defense?

5 MS. FREEMAN: No, Your Honor.

6 THE COURT: Other than I've kind of taken part of
7 your lunch break and the court reporter and everybody else
8 in the courtroom.

9 So, Lori, I think you are with me at 1:30 too,
10 aren't you?

11 COURT REPORTER: Yes, I am.

12 THE COURT: Well, we will stand in recess. Thank
13 you for your arguments and thanks, everybody, for coming in
14 and have a good weekend, everyone.

15 MR. TAMKIN: Thank you too, Your Honor.

16 MS. FREEMAN: Thank you, Your Honor.

17 THE COURT: We are in recess.

18 (Court adjourned at 12:34 p.m.)

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3 I, Lori A. Simpson, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter.

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7 Certified by: s/ Lori A. Simpson

8 Lori A. Simpson, RMR-CRR
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LORI A. SIMPSON, RMR-CRR
(651) 848-1225